The Central Law Journal.

ST. LOUIS, SEPTEMBER 2, 1881.

CURRENT TOPICS.

The chancery division of the English High Court recently rendered a decision of considerable interest upon the subject of the right of a partner, who has no interest in the good-will of the old business, to carry on the same trade or business, and issue circulars and bids for patronage to former customers. The circumstances of the case were as follows:

M and C, wine merchants, were in partnership, which was about to expire on the 30th of June by effluxion of time, when, under their articles, M was to be entitled to the good-will of the business, purchasing C's share at a valuation. On the 25th, C informed M that he intended to issue to all the customers of their firm, and the trade generally, the following circular:

"Gentlemen,—In consequence of my partnership with Mr. M having expired by effluxion of time, I have joined my friends, Messrs. F, to whose circular annexed I beg to draw your attention. I hope in a few days to announce the foreign agencies with which my firm will be intrusted. I take this opportunity to thank you for your valued support during the last seven years, and to solicit a continuance of the same in the future." Messrs. F's circular was not shown to M.

M's solicitors having, on the 29th, objected to this circular, C's solicitors wrote the same day: "We have advised our client to alter his circular by striking out the only words to which M can possibly have any objection." No copy of the circular as altered was sent with this letter. On the 30th, M's solicitors replied, "Unless C, or you on his behalf, will give us immediately an undertaking not to issue any circular to customers, we shall be compelled to apply to-morrow for an injunction," etc., and this letter not being at once answered, M commenced an action against C for an injunction to restrain the issue of the circular, and other relief. The alteration referred to in the letter of C's solicitor, consisted of striking out the words "to solicit a continuance of the same in the future."

The annexed circular of Messrs. F was printed on the other page of the same sheet of paper, and was as follows: "Gentlemen —We have the pleasure to inform you that our friend, Mr. C, has this day joined our firm, the style of which will be F, C & Co. At foot we beg to hand you our respective signatures. Thanking you for your support in the past and soliciting a continuance in the future to the new firm." Messrs. F were themselves an old-established firm of wine merchants. M applied for injunction, and it was held that C must be restrained until the hearing or further order from issuing the three circulars, and from applying either himself, his partners, servants or agents, to any person who was a customer or correspondent of the old firm prior to the 30th of June, 1881, privately, by letter, personally, or by a traveler, asking such customer to continue to deal with him or not to deal with M.

We have been not a little interested by the phenomenon exhibited by our column of "Queries and Answers" during this summer. As the warm weather and the idle days of vacation approached, some of our readers seem to have given themselves up to the amusement of asking puzzling questions, while others have exercised their legal acumen in reading the riddles. Many, perhaps most, of these queries bear internal evidence of being founded upon actual cases, and nearly all demand and merit careful thought. The answers, too, which for some time past we have always printed with the query prefixed for convenience sake, show indications of having received the benefit of some of the superfluous leisure consequent upon the hot weather. Altogether we feel proud of this volunteer department.

THE SURVIVING PARTNER.

II.

In commercial partnerships especially, and indeed in all partnerships, the good-will of the firm is a very important incident, and a valuable part of the property of the partnership. Whether the surviving partner is entitled to this portion of the assets of the defunct firm, has been a matter of some controversy

and not a few contradictory decisions, especially in England, where the theory of survivorship holds more firmly to the judicial mind than in the United States. In Hammond v. Douglas,[1] decided in 1800, the chancellor was clearly of opinion that, in the absence of stipulations to the contrary, the good-will of the firm inured to the surviving partner, and that a sale of it could not be compelled by the representatives of the deceased; that it was not partnership stock of which a division could be compelled. The authority of this case, however, upon this point, was questioned by Lord Eldon in Crawshay v. Collins;[2] but in Lewis v. Langdon[3] (in 1835), the doctrine held in Hammond v. Douglas,[4] was re-asserted by the vice-chancellor, who held that the surviving partner had a right to carry on the business under the firm name, and, to that extent at least, the good-will of the firm survived to him.

In Wedderburn v. Wedderburn,[5] in 1856, all the cases on the subject are reviewed at length, and it is held that the good-will of a trade is an appreciable part of the assets of a firm, both in fact and in the estimation of a court of equity; that a share of it belongs to the estate of a deceased partner, and does not inure beneficially to the surviving partner, unless it has been so stipulated by express agreement; and this, it may be concluded, is the settled law of England on the subject.

In the United States, the law has been very distinctly settled in accordance with the principle held in Wedderburn v. Wedderburn.[6] In Dougherty v. Van Nostrand,[7] the court, in express terms, disavowed the authority of Hammond v. Douglas, and held that the good-will of a trade does not inure to the surviving partner, but is partnership property, and if not otherwise disposed of by consent, must be sold. Its material and merchantable character is expressly recognized in Williams v. Wilson,[8] in which three partners carried on the double and somewhat incongruous business of conducting a private lunatic asylum *and* a boarding house for immigrants. In the settlement of their affairs in chancery, a receiver was appointed, who was instructed to sell the good-will of the business, and the court ordered that each of the partners, unless he purchased the good-will, should be restrained from carrying on the business in the city.

In Wade v. Jenkins,[9] it was held that in the valuation of partnership property, after dissolution, the good-will of the firm must be included; and in Butler v. Burleson,[10] an injunction was granted to restrain a partner from violating an agreement, not to compete, after the dissolution of the firm. In Holden v. McMakin,[11] it was held that the good-will of a newspaper is partnership property, and does not inure to the surviving partner.

It may fairly be concluded, therefore, that in the United States and in England, the good-will of a business survives to the surviving partner only in the same sense that every other part of the partnership estate survives to him,—in trust for himself and the estate of his deceased partner. There is one exception perhaps; it seems that the rights of surviving partners, in cases of professional partnership, stand upon a different footing from those of commercial partners; that the survivor is entitled to the good-will of the firm, may carry on the business without paying anything to the estate of the deceased for the privilege of doing so, or may sell out the connection without accounting for the proceeds.[12]

It has already been said that the surviving partner has the exclusive privilege of bringing suit on behalf of the firm against its debtors or any other persons against whom it may have a cause of action. If the debt is nominally due to the firm, the suit must be brought in the name of the surviving partner, although the beneficial interest is in the representatives of the deceased.[13] Even if he

1 5 Ves. 539.
2 15 Ves. 226; see, also, Crutwell v. Lye, 17 Ves. 336.
3 7 Simons, 421.
4 *Supra.*
5 22 Beav. 84. This case is a little remarkable as an illustration of the very deliberate manner in which chancery suits are conducted in England. The original partnership was dissolved by death in 1801; the business was carried on by surviving partners till 1831, when a bill was filed for an account; and in 1856 the last decree was entered, the case [illegible] prematurely in that year by a compromise.
6 *Supra.*
7 1 Hoffman Ch. 68.
8 4 Sandf. Ch. 379; see, also, Harrison v. Gardner, 2 Madd. Ch. 47.
9 2 Giffard, 509.
10 16 Vt. 176.
11 1 Pars. Sel. Eq. Cas. 270.
12 Farr v. Pearce, 3 Madd. Ch. 47.
13 Clark v. Howe, 23 Me. 560; Peters v. Davis, 7 Mass. 257; Smyth v. Hawthorn, 3 Rawle, 355.

was a dormant partner when the firm was in full life, if he survives, he may sue, although the rule is that, in an action by a firm, the name of the dormant partner should not be used.[14] The surviving partner only can sue for trespass upon partnership property, the representatives of deceased having only an equitable interest until after final settlement.[15]

There is an exception by statute to the rule that the surviving partner must always and alone represent the firm as plaintiff in the courts. In Louisiana, before he can sue, he must receive authority from the Probate Court.[16] He must either show authority as liquidator, or else join in the action of the representatives of the deceased;[17] and if there are more than one surviving partner, all must join,[18] show authority, or else include the heirs as parties to the action. In Louisiana the rights of the surviving partner have been materially modified by statute. The right of succession to the share of the deceased is in his heir, and without his consent the surviving partner can take no authority over that share.[19]

In two other States are like innovations. In Maine, unless the surviving partner gives a bond required by the statute, the administrator of the deceased partner takes actual possession of the assets;[20] and in Missouri there is a similar statute. Where, in the latter State, a surviving partner gives the required bond, it is held that the only authority that can be exercised over him by the probate court, is through the bond. This is available for creditors and others, like the bond of an administrator or guardian. The surviving partner can not be removed from office, although he may have left the State.[21] He is only obliged to account for such assets as have come to his hands as surviving partner. His powers are not restricted further than required by the conditions of the bond, and he is not required to pay claims presented *pro rata*, but may pay in full such as he sees fit.[22] It is held, however, that he has all the rights, and is subject to the liabilities, of an administrator.[23]

Of course, the surviving partner is at all times and everywhere liable to be sued for the debts of the partnership. The only question that has arisen in this connection has been how far the executor or administrator of his deceased partner shares this liability with him. The English rule has been that, by the mercantile law, a partnership account is several as well as joint, and that therefore a joint creditor is entitled to satisfaction out of the estate of the deceased partner, although it does not appear that the surviving partner is insolvent.[24] It is held to be proper, however, that the surviving partner should be a party to a suit of this kind, although the remedy against him is altogether at law. The later English decisions, however, favor the opposite rule. In *Ex parte* Dear[25] (in 1876), it was held, that where there is a joint estate, it must be applied first to the payment of the joint creditors, the separate estate, to the separate credi tors, the surplus only being mutually and interchangeably liable to the debts of the other class.

In accordance with this last rule is the doctrine generally held in the United States, that no suit in law or equity can be sustained against the representatives of a deceased co-partner, or to charge his estate for co-partnership debts, if the surviving partner is solvent, and the assets of the firm sufficient.[26] To maintain an action against the representatives of the deceased partner, the plaintiff must either prove the insolvency of the survivor or show that he has exhausted his legal remedies against him.[27] In such case the legal remedy is held to be against the survivors only, the estate of the deceased

[14] Clark v. Miller, 4 Wend. 628; Clarkson v. Carter, 3 Cowen, 84; Beach v. Hayward, 10 Ohio, 455.

[15] Pfeffer v. Steiner, 27 Mich. 537.

[16] Flowers v. O'Connor, 7 La. 194.

[17] Connelly v. Cheever, 16 La. 30; see, also, McCord v. West, 1 Rob. (La.) 519; Lockhart v. Harrell, 6 La. Ann. 531.

[18] Hyde v. Brashear, 19 La. 402; Babcock v. Brashear, 19 La. 404.

[19] McKowen v. McGuire, 15 La. Ann. 637; Skipwith v. Lea, 16 La. Ann. 247.

[20] Putnam v. Parker, 55 Me. 235; Cook v. Lewis, 36 Me. 340.

[21] Green v. Virden, 22 Mo. 510.

[22] Crow v. Weidner, 36 Mo. 412.

[23] *In re* Bruening, 42 Mo. 277.

[24] Wilkinson v. Henderson, 1 Mylne & K. 582; Devaynes v. Noble, 1 Merlv. 530; S. C., 2 Russell & M. 495; Ridgway v. Clare, 19 Beav. 111; see, also, Thorpe v. Jackson, 2 Younge & C. Ex. 553; Slater v. Wheeler, 9 Sim. 157.

[25] 1 Ch. Div 514.

[26] Troy Iron Co. v. Winslow, 11 Blatchf. (U. S. C. C.) 513; see Voorhis v. Baxter, 1 Abb. Pr. 43; Tracy v. Suydam, 30 Barb. 110.

[27] Pope v. Cole, 55 N. Y. 124; Voorhis v. Childs, 17 N. Y. 354; Richter v. Poppenhausen, 42 N. Y. 373.

is discharged at law, and can only be held in equity when the survivors are insolvent.[28]

The general rule on this subject, however, has been modified in some of the States by statute. In Tennessee by the act of 1789, ch. 57, sec. 5, a creditor of a firm may sue at his election the executor of a deceased partner or the surviving partner, either or both.[29] In Alabama the same rule was adopted by the statute of 1818,[30] and in Mississippi the creditor of the partnership may sue either the executor or the surviving partner; but, in case of insolvency, the joint creditors are confined to the joint funds, and the separate creditors to the separate funds.[31]

Creditors of a firm can only look to the surplus of a deceased partner's estate after the payment of his individual debts, and separate creditors to the surplus of the joint estate.[32] The surviving partner, however, having paid off the partnership debts, does not stand on the footing of a joint creditor, but is entitled to come in *pari passu* with separate creditors for contributive payment of such debts, because, as between the solvent surviving partner and the insolvent deceased partner, the claim for such payment is a separate debt.[33]

As the surviving partner combines the character of an original party to the contracts of the firm and that of representative of a deceased party, there are some peculiarities of right and remedy growing out of the anomaly. Where he brings suit on a demand due to the firm, a promise to him by the debtor after the death of his co-partner will take the case out of the statute of limitations. It is not a new *assumpsit*, but is a saving of the remedy on the original promise, the right and remedy are united in him, the original promise still exists, and the right of action survives to him.[34] His representative capacity, however, does not enable him to prejudice the estate of the deceased partner by admissions and payments. Where he is executor, as well as surviving partner, acts, that he might well do in the latter capacity, can not be regarded as done by him as executor to the disadvantage of the estate; and, although he may keep alive the demands of a creditor against the firm by promises or payments, he can not thus deprive the estate of the benefit of the statute of limitations.[35]

As the surviving partner holds the legal title to the assets of the firm, it has been held that they become liable to his individual debts. The *choses in action* of the firm may be attached for such debt, and the creditor is not bound to show that the accounts of the firm have been settled, or that, when settled, the assets attached would not exceed the share which would be allotted to the surviving partner. The creditor can not be deprived of the advantage gained by the fact that the law has thrown the legal estate upon the surviving partner, and if there exist equitable liens in favor of firm creditors, such liens must be set up by their holders in courts of equity.[36]

When it becomes necessary for the administrator of a deceased partner to coerce a settlement by the surviving partner, it is necessary in the bill filed for an account to allege either misappropriation of assets,[37] or that without authority the surviving partner has used the assets of the firm in continuing the business,[38] or else that the debts of the firm have been all paid and its affairs settled.[39] Unless one or the other of these facts can be established, or equivalent grounds of equitable relief sustained, a court of equity will not interfere with his proceedings. As the right of the deceased is only to his ascertained share of the assets, the surviving partner can not be held to an account, except for fraud, before he has completed such settlement.

Where there are more than one surviving partner, they are joint tenants under the law merchant, and one can not bind the other by accepting a bill, or indorsing a note, or otherwise, without authority;[40] nor can he assign the joint effects to trustees for the

[28] Sherman v. Kreul, 42 Wis. 33.
[29] See Saunders v. Wilder, 2 Head, 577; Simpson v. Young, 2 Humph. 514.
[30] McCullough v. Judd, 20 Ala. 703.
[31] Isley v. Graham, 46 Miss. 425.
[32] McCulloh v. Dashiell, 1 Harris & G. 96; Bowden v. Schutzell, 1 Bailey Eq. 360; Smith v. Mallorey, 24 Ala. 628.
[33] Busby v. Chenault, 13 B. Monr. 554; Payne v. Matthews, 6 Paige, 19.
[34] Barney v. Smith, 4 Harris & G. 485.
[35] Way v. Bassett, 5 Hare, 66.
[36] Berry v. Harris, 22 Md. 30.
[37] Costley v. Towles, 46 Ala. 660.
[38] Cheeseman v. Wiggins, 1 Th. & C. (N. Y.) 595; Skidmore v. Collier, 15 N. Y. (Sup. Ct.) 50.
[39] Krutz v. Craig, 53 Ind. 561.
[40] Jenness v. Carlton, 40 Mich. 343.

benefit of preferred creditors[41] without the consent of the other survivor. They have lost the power incident to the relation of partners to bind each other and the firm by acts done singly, and must act conjointly to act efficiently.

The surviving partner is not allowed any compensation for his time and labor in winding up the business of the firm, or in carrying it on under a stipulation previously entered into to that effect, unless, indeed, there had been a provision for such compensation in the articles of partnership or other agreement obligatory on the estate of the deceased partner. It was so held in Burden v. Burden[42] and Stocken v. Dawson,[43] in both of which cases the surviving partner was also the executor of his partner. In Piper v. Smith,[44] followed by Berry v. Jones,[45] it is declared to be settled law that a surviving partner, even though appointed receiver at his own instance, is not entitled to any compensation for settling up the business of the firm. In North Carolina, however, in the case of Royster v. Johnson,[46] it is held that "the English doctrine that executors, trustees, surviving partners, etc., are not entitled to commissions or compensation for their services, is not suited to this country." And, therefore, a surviving partner should be allowed reasonable compensation for his services in winding up the affairs of the partnership.

WILLIAM L. MURFREE, SR.

VENDOR AND PURCHASER AS REGARDS FIRE INSURANCE.

The decision of the Master of the Rolls in Raynor v. Preston[1] was affirmed by the Appeal Court in a considered judgment recently, Lord Justice James dissenting. The circumstances, as our readers may perhaps remember, were these: The vendor of a freehold house at the date of the contract for sale was the holder of a policy insuring the house against fire; the house was burnt down in the interval between the date of the contract and the time fixed for completion of the purchase; the vendor received the insurance money from the office; and the question was whether the purchaser was entitled, as against the vendor, to the benefit of the insurance, either by way of abatement of the purchase money or reinstatement of the premises. The Master of the Rolls decided against the purchaser's claim.

We have before stated our opinion[2] that, both on principle and on the authorities, the decision of the Master of the Rolls was correct. Our opinion is now confirmed, and, having considered the reasons given by Lord Justice James in support of the opposite view, his dissent does not in any degree diminish our confidence that the law on the subject has been correctly laid down by Lords Justices Brett and Cotton, who constituted the majority in the Court of Appeal. We say, with the sincerest respect for the able and admirable senior Lord Justice, that, being aware of his strength, and that he would adduce and urge in support of his dissent everything that could be adduced and urged, we have been unable to feel the force of his reasoning, and therefore are rather fortified than otherwise in our original opinion. Lord Justice Cotton, in a careful judgment, in which Lord Justice Brett substantially concurred, held that, apart from any question arising out of the 14 Geo. 3, c. 78, a contract of fire insurance was a personal contract of indemnity collateral to the land; that the contract for sale passed all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not the benefit of a contract of fire insurance; and that (as was conceded), if there had been no insurance, the destruction of the house by fire would have been no answer to the vendor insisting on specific performance without compensation; that the contract of insurance was not a contract of repair—but to pay a sum of money; that by express condition in the policy, if not by the general law, the assignee, by way of purchase of the thing

41 Egbert v. Wood, 3 Paige, Ch. 517.

42 1 Ves. & B. 170; see, also, Ames v. Downing, 1 Bradf. 321.

43 6 Beav. 371.

44 1 Head (Tenn.) 93.

45 11 Heisk, 206; see, also, Caldwell v. Leiber, 7 Paige, 483; Franklin v. Robinson, 1 Johns. Ch. 157; Bradford v. Kimberley, 3 Johns. Ch. 431; Beatty v. Wray, 19 Penn. 516; Brown v. McFarland, 41 Penn. 129.

46 73 N. C. 474.

1 14 Ch. Div. 297; 43 L. T. Rep. N. S. 18.

2 69 L. T 2

insured, was not entitled to the benefit of the fire policy. Lord Justice Brett, pointing out that a fire policy in this respect must be governed by the same considerations as a marine policy, as to which it had been held that the assignee of insured goods, who had never contracted for the benefit of the insurance, was not entitled to any benefit, and that the assignor, not retaining any interest, was not himself entitled to any benefit.[3] This was the turning point of the case. If the contract of insurance were collateral, the purchaser was really out of court. On this question Lord Justice James was of a different opinion, holding that a fire policy is in effect a contract that, if a fire happen, the insurance company will make good the actual damage sustained by the property. In support of this he said that he was not aware of any case in which, on an insurance by a tenant for life, the value of the life interest had ever in any way been regarded by an insurance office in paying on its policies; and that the provisions of the 14 Geo. 3, c. 78, enabling any person interested to require the office to lay out the money in rebuilding, tended in the same direction to support his opinion.

There were, however, other contentions of the appellant with which the court had to deal. It was said that between the date of the contract and the time for completion the vendor was merely a trustee for the purchaser, that he only obtained the insurance money from the office on the strength of his legal title. Here, again, Lord Justice James differed from his brethren, holding that a vendor, after the date of the contract for sale, is strictly and properly a trustee, and, therefore, that any benefit which accrued to him enured for the advantage of the beneficial owner. Lords Justices Cotton and Brett pointed out that a vendor, pending the completion of the contract, was a trustee only in a qualified sense, the purchaser's right depending on his acceptance of the title and the payment of the purchase-money, and that it was because of the uncertainty as to the fulfilment of these conditions, that the office could not defend an action on a fire policy by an unpaid vendor.[4] From this it would appear that it is only because of the uncertainty above mentioned, and the impossibility of predicting whether the conveyance will ever be completed, that it is no defense for an insurance company to show that the policy holder suing is an unpaid vendor. It would, also, appear that after the completion of the purchase, when it is proved by the event that the vendor, when he received the money, had no equitable interest in the thing insured, it must follow, as in Darrell v. Tibbits,[5] that the insurance company is entitled to recover back the insurance money. Though it was not necessary to decide this point, the Court of Appeal, as well as the Master of the Rolls, in Raynor v. Preston,[6] expressed an opinion that the vendors could not as against the office retain the insurance money.

As to the point taken by Lord Justice James in regard to an insurance by a tenant for life or other limited owner, being entitled to receive the full amount of the damage by fire, we should dispute that, as a general proposition, he is so entitled.

Take the case of the death of the tenant for life, or the failure of the limited ownership before the claim on the policy is settled. Could it be contended that damages were to be assessed without regard to the fact that the policy-holder's interest was at an end, and that the real amount of mischief he had sustained had been ascertained by the event?

It may well be that, where a limited owner insures and his interest is a subsisting one, his insurable interest is not limited to the value of his limited interest, on the ground that in order to his full compensation he requires the insurance money for repairing the property injured in order to his enjoyment thereof *in specie*. Thus, in Simpson v. Scottish Union Insurance Company,[7] Sir W. P. Wood said that he agreed "that a tenant from year to year having insured would have a right, under the statute, to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of the tenancy from year to year."

In regard to the application of the statute of Geo. III., Lord Justice Cotton declined to give an opinion whether purchasers pending the completion of a contract are persons

[3] Powles v. Innes, 11 M. & W. 10.
[4] See Collingridge v. Royal Exchange Assurance Corporation, 37 L. T. R. (N. S.) 525.
[5] 42 L. T. R. (N. S.) 796.
[6] *Supra*.
[7] 1 H. & M. 618; 8 L. T. R. (N. S.) 112.

"interested" within its meaning, but held that even if they were, the act only gives a right to insist on the money being applied in reinstating, and that insistance was essential to the right. This point was expressly so decided by Sir. W. P. Wood in the case last cited. If we may venture an opinion on the question left open by Lord Justice Cotton, we should be inclined to say that, although purchasers pending completion are persons interested in the thing insured, yet the statute can only apply where, in fact, at the date of the fire there is an interest remaining in the person originally insured, and that the completion of the purchase relating back to the date of the contract conclusively shows that the vendor at the date of the fire had no insurable interest whatever, and that he was merely a trustee for a purchaser, who, as such, is not entitled to the benefit of the insurance contract.—*Law Times.*

NEEDS OF THE FEDERAL JUDICIARY.

The exhaustive article by Mr. Justice Strong in the May number of the *North American Review*, on "The Needs of the Supreme Court," has attracted, as it well deserves, very general attention. In that article, Judge Strong demonstrated the imperative need of legislation looking to the relief of the Supreme Court, now overwhelmed with business and about three years behind its calendar; and he suggests as the least expensive and most feasible plan, an increase of the number of circuit judges, and the establishment of an intermediate court of appeals in each circuit, with final appellate jurisdiction, with certain exceptions, in all cases involving not more than $10,000.

The importance of this measure, as a means of relieving the Supreme Court, is made so clear by what is said by Judge Strong, that nothing further upon the subject is needed. It is indeed apparent that the evil complained of is a grievous one; for a delay of three years, either in the collection of a just debt, or in the final settlement of an honest dispute, is often ruinous in its consequences. Within that period both debtors and bondsmen may become worthless, and in such case, there is a practical denial of justice. The evil is increasing with the growth of inter-State commerce and the extension of the Federal jurisdiction, to such an extent that a remedy is demanded by the needs of the Supreme Court alone. Our purpose in this article is to show that some such legislation is also required, and not less urgently, by the needs of the Circuit Courts. It is believed that no court was ever before clothed with an original jurisdiction more varied, important and extensive, than that which is devolved by law upon the Circuit Courts of the United States; and it is not to be supposed that Congress will long delay to provide the means necessary to the proper performance of public duties so important. It will not be denied that the judicial force should be sufficient to dispose of the business of these courts with reasonable promptness, and at the same time with that degree of care and deliberation which its importance demands. The defect in the present system is, that it does not provide a sufficient judicial force. Among the evils incident to this lack of force, we may call attention to the following:

1. A large majority of all the cases must be heard and determined by a single judge. Even when two judges are present, the great pressure of business, and the great expense to litigants attendant upon delay, makes it necessary for the judges to avail themselves of the privilege given by law,—of separating, and holding two courts at the same time. The theory of the judiciary acts is, that all important questions of law should be determined by the full bench; and litigants justly complain when they are deprived of this right. It is an important right. The value of discussion, and a comparison of views by judges in conference, can hardly be overestimated. The Federal judicial system is based upon the theory that the concurrence of two judges in the judgment of the circuit courts in important cases is desirable; or that in case of a difference of opinion, while the view of the presiding judge shall prevail, the case, irrespective of the amount in controversy, may go to the Supreme Court. The theory is sound, and nothing is lacking save the necessary judicial force to carry it out. This evil is greatly enhanced since the right of appeal has been taken away in all cases involving less than $5,000. Where the judgment is final

the consideration of the full bench is doubly important.

2. The present judicial force is so small that the circuit judge can not, by possibility, attend all the terms of the circuit court. This will be made apparent as we proceed. It certainly requires no argument to show that the policy of establishing circuit courts which the circuit judge can not attend, and which must, however important the cases, be held by a single district judge, with final jurisdiction in all criminal cases, and in all civil cases involving $5,000 or less, without opportunity for conference, and without power to certify a division in case of doubt, is a policy which can not be defended. It is a policy which violates the spirit of our judicial system. I do not believe that Congress has erred in establishing Federal courts in too many places. As it is, they are few and widely separated. The error is not in establishing so large a number of courts, but in providing too small a number of judges.

The present deplorable lack of judicial force makes litigation in the Federal courts both tedious and expensive. As already suggested, these courts are comparatively few in number, and necessarily far removed from many of the people who are compelled to litigate in them. The importance of promptness in the dispatch of business is, therefore, manifest. When parties and witnesses have traveled, as they often must, several hundred miles to reach the place where the court sits, it is a great hardship to keep them waiting indefinitely for a hearing, or to send them home, to return again at the next term.

3. The evils of the present lack of judicial force, and the needs of the circuit courts in general, may well be illustrated by reference to the situation of affairs in the Eighth circuit, concerning which we will call attention to some of the more important facts. They will, in the main, apply to each of the other circuits. No doubt, the evil is more pressing in the southern and western circuits than in the eastern, but it is great in all.

The eighth circuit comprises the States of Minnesota, Iowa, Missouri, Arkansas, Kansas Nebraska and Colorado—a territory embracing 517,510 square miles, and larger by 175,000 square miles than the original thirteen States. It contains a population of nearly eight millions, or about twice as large as that of all the States in the Union at the time the judicial system was established. Within the circuit there are held annually twenty-nine terms of the circuit court, as follows: Minnesota, two terms; Iowa, eight terms; Missouri, six terms; Arkansas, four terms; Kansas, three terms; Nebraska, two terms; Colorado, four terms. Total, twenty-nine terms. Some of these terms continue in session for months, and the two at St. Louis occupy substantially the entire year.

Although, as already suggested, the law clearly contemplates that the circuit judge shall be present at every term of the circuit court, and sit in the hearing of all the more important cases, it is physically impossible for him to attend more than one-half of these terms, and his stay at each of the places visited by him must necessarily be brief. The number of causes pending in these courts, and awaiting a hearing, aggregates from three to five thousand, and in the event of the passage of a new bankrupt law, there would be a sudden and large increase. Of course, the circuit justice can do but little circuit duty, in addition to the great labor devolving upon him as a justice of the Supreme Court. The result is that, perhaps, two-thirds of all the business of the circuit court is transacted by the district judges, sitting alone, and this notwithstanding the greatest industry on the part of the circuit judge. This is, as we have seen, unjust to litigants, and violative of the spirit of the judiciary acts. It is also unjust to the district judges who are thus required to do double duty, and to perform services not contemplated by law, and for a compensation which, as compared with their labors and responsibilities, is, as all must admit, grossly inadequate. Beyond doubt, there is in this circuit to-day more judicial business than there was in the whole Union in 1789, and yet the States which compose it are some of the youngest in the Union, and in the very infancy of their growth and development. During the last ten years these seven States have increased in population to the extent of about three millions of people, and correspondingly in wealth and commerce. How inadequate has been the legislation of Congress to provide increased facilities to meet the vast increase of judicial business growing out of the marvelous growth of the country! The Supreme Court has been in-

creased in numbers, but as it must always act as a unit in considering and deciding causes, it is capable of despatching little, if any, more business than when composed of six justices. The circuit courts are organized just as they were in the beginning, except that the number of circuits has been increased to nine, and one circuit judge provided for each. The circuit judge, however, performs only the duties which, in early days, were performed by the Supreme Court justice assigned to the circuit, so that, practically, the only increase of judicial force is the creation of three additional circuits with a circuit judge for each. This, to meet the demands upon the Federal judiciary occasioned by the addition of twenty-five great States to the Union, of at least 40,000,000, to our population, and of an incalculable amount to our wealth, not to mention the addition of many new and important subjects of cognizance in the Federal courts. In view of these facts it should excite no surprise that our circuit courts are over crowded; that they are compelled to dispose of business with great rapidity, and are still far behindhand, and that many important cases are necessarily tried before a single judge. Such being the present situation, what may we expect in the near future, if Congress shall continue to neglect to provide relief? The business of the Federal courts is necessarily increasing with the growth of commerce, the increase of population and wealth, and the multiplication and extension of railroads and other arteries of inter-State trade. These courts deal very largely with controversies between citizens of different States over which the Constitution itself gives the Federal judiciary jurisdiction. It is manifest that in these days of rapid transit, trade and traffic between citizens of different States must continue to increase, and the evils complained of must grow annually more burdensome, until the remedy is applied. We must remember, too, that our great territories, now rapidly being settled, must soon come into the Union as States, bringing with them a vast amount of business for the Federal courts growing, not only out of their trade with citizens of other States, but also out of the laws of Congress concerning public land, mines and mining, and the Indians. All things being considered, the utter inadequacy of the present judicial force is so apparent, that no argument can make it more so.

The evil is apparent. It is a lack of judicial force. The remedy is equally so. It is to increase the force. In several of the larger circuits there should be two additional circuit judges; in the others, one additional. In some of the districts there should be an additional district judge. No increase in the number of circuits is necessary or desirable. The act should authorize the circuit justice to assign the additional circuit judges to duty in the circuit, when not engaged in the Court of Appeals. In this way they can be employed wherever their services are most needed. But it is not our purpose here to enter into details. These can be readily arranged, if Congress will set to work resolutely to remedy the evils complained of. With a proper increase of the number of circuit judges, relief can be afforded at the same time to the Supreme Court and the circuit courts, to the end that the Federal judicial business in all courts may be transacted with promptness and yet with proper care and deliberation.

G. W. M.

REMOVAL OF CAUSES — CONFLICTING STATE AND FEDERAL JURISDICTION.

KERN v. HUIDEKOPER.

Supreme Court of the United States, October Term, 1880.

1. Where a petition for removal of a cause is filed and contains all the proper legal averments, and is accompanied by a proper bond in accordance with law, and the State court refuses to order the removal, and the party seeking the removal files a transcript of the record in the clerk's office of the United States Circuit Court, the jurisdiction of the Federal court will immediately attach in spite of the fact that the defendant is the sheriff of the State court and holds possession of the subject-matter of the suit in his official capacity.

2. The jurisdiction having once vested in the Federal court, it will not be affected by the fact that the State court continues to claim jurisdiction of the cause and proceeds to a final adjudication of it; nor does the fact that the party, at whose instance the removal is made, continues to contest the cause, constitute a waiver on his part of the question of jurisdiction of the State court.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice WOODS delivered the opinion of the court:

This was an action of replevin brought by Frederick W. Huidekoper, John N. Dennison and Thomas W. Shannon, in the Circuit Court of Cook County, Illinois, at its May term, 1877, to wit, on May 22, 1877, against Charles Kern, the plaintiff in error, to recover the possession of 1,000 tons of railroad iron, which they claimed was wrongfully detained from them by Kern. The writ of replevin was issued on May 23, 1877, and upon the same day was served by the coroner of the county, who received from the plaintiffs in replevin a statutory bond, and delivered to them the possession of the iron. The summons was made returnable at the next term of the court, which began on the third Monday in June. The declaration, which was filed June 30, alleged that plaintiffs were the owners and lawfully entitled to the possession of, certain goods and chattels, to wit, the iron in controversy, which formerly had been in track of the Chicago, etc. R. Co., but that it was then lying along tho Mud Lake track, near Twenty-fourth street, in the city of Chicago, and that it was of the value of $18,000; that on May 9, 1877, Kern, the plaintiff in error, had wrongfully taken possession of said iron, and still detained the same from them.

Kern, on July 6, 1877, pleaded that he was the sheriff of Cook county, and that he held the iron by virtue of two certain executions against the Chicago, etc. R. Co. levied on the same, both issued upon judgments in the Superior Court of Cook county, one in favor of the Bank of North America, and the other in favor of one John McCaffrey, for the aggregate sum of about $11,000. That as such sheriff, on or about May 1, 1877, the said writs being then in full force and unsatisfied, he took said iron and detained the same in execution of said writs, and that at the time of the levy the iron was the property of the Chicago, etc. R. Co. On May 31, 1877, the plaintiffs filed in the court their petition to remove said cause to the United States Circuit Court for the Northern District of Illinois. The petition alleged that the defendant, Kern, was a citizen of the State of Illinois, and that the plaintiffs at the institution of the action were, and still continued to be, citizens of States other than the State of Illinois; that the amount in controversy in the suit exceeded $500, and there had been no trial of the suit, and the same could not have been tried before the term at which said petition was filed; and that the suit involved a controversy between citizens of different States, which could be wholly determined between them.

The petition was accompanied by the bond required by the statute of the United States. On June 2 the court denied the petition for removal, on the ground that it was prematurely presented and filed; that at that date no declaration had been filed, the defendant was not in court, and was not required to appear until the third Monday in June. On June 30 the petition of the defendants in error and their bond for the removal of the cause being still on file, and the time for the appearance of the plaintiff in error having passed, the defendants in error filed their declaration, and immediately moved the court for an order transferring the cause, in accordance with their petition, to the United States circuit court. This motion was denied.

On July 6, the date upon which the plaintiff in error filed his plea, and after said plea had been filed, the defendants in error caused an order to be entered dismissing their petition for the removal of the cause filed May 31, and immediately filed another for the same purpose, containing the same averments, together with a bond, as required by the statute. This petition was also denied by the State court.

Nevertheless, on July 27, 1877, the plaintiffs below filed a transcript of the record of the cause in the clerk's office of the circuit court of the United States for the Northern District of Illinois, the term of said court, prescribed by law to begin on the first Monday of July, being then current. On November 14, 1877, the said term of the United States circuit court still continuing, that court made an order approving the filing of the said record on July 27 preceding. On June 5, 1878, the counsel of the plaintiffs below moved the United States circuit court that an order be entered declaring that the cause had been removed from the circuit court of Cook county, and that the circuit court of the United States had exclusive jurisdiction thereof by reason of such removal, and that the cause be placed on the trial calendar of the court. The court sustained the motion, and directed an order to be made in accordance therewith. On June 26, 1878, the defendant below, by his attorney, entering special appearance for that purpose, filed a written motion in the United States circuit court for the dismissal of said action. This motion was overruled.

At the July term, 1878, of the circuit court of Cook county, that court still claiming jurisdiction of the cause, notwithstanding the proceedings for its removal above recited, the plaintiffs below filed in that court a replication to the plea of the defendant, in which they alleged that said railroad iron at the time of the levy was the property of the plaintiffs, and not of the railroad company, as alleged in defendant's plea.

On November 12, 1878, the defendant below moved in the Circuit Court of the United States for leave to file a plea to the jurisdiction, which, after argument of counsel, was granted. Thereupon, on the same day, he filed the following plea: "The defendant, by E. Walker, his attorney, comes and prays judgment of the said record herein filed, because he says that the plaintiffs first instituted their said action of replevin in the circuit court of Cook County, in the State of Illinois, which said court has exclusive original jurisdiction of said action, and caused the clerk of said State court to issue a summons against the said

defendant and a writ of replevin, under which said last-named writ the property described in said writ and declaration was seized by the officer of said court and delivered to the said plaintiff. That said writs were made returnable to the June term of said court, A. D. 1877, at which said term the said defendant appeared and filed his plea to said declaration. The said defendant further shows that long after the filing of the said transcript of record in this court, the plaintiffs, to-wit, at the May term, 1878, filed in the said circuit court of Cook County their replication to the said defendant's plea, and at said term of said State court prosecuted their said action to a final hearing; and such proceedings were thereupon had in said action that afterwards, to-wit, at said May term, to-wit, on the 5th day of June, A. D. 1878, the said defendant, by the consideration and judgment of the said circuit court of Cook County, recovered a judgment against the said plaintiffs for the return to him of the property described in said declaration and writ of replevin, being the same identical property described in the aforesaid transcript of record, and for his costs in said action, as by the record and proceedings thereof still remaining in said circuit court of Cook County more fully appear, which said judgment is in full force, and unreversed and unsatisfied, and this the defendant is ready to verify by the record. Wherefore the said defendant prays judgment, if the court here will take jurisdiction and cognizance of the action aforesaid."

The plaintiffs below filed a demurrer to this plea, and afterwards, on November 21, 1878, the demurrer was argued. The minutes of the court state its judgment upon the demurrer as follows: "Now come the plaintiffs, by Henry Crawford, Esq., their attorney, and the defendant by Edwin Walker, Esq., his attorney, and now comes on to be heard the demurrer of the plaintiffs to the plea to the jurisdiction herein; and after hearing the arguments of counsel, the court sustains the demurrer; to which ruling of the court the defendant, by his counsel, excepts, and the defendant failing to make further answer herein, and electing to abide by his said plea, it is thereupon considered by the court that the plaintiffs have and retain possession of the goods and chattels described in the writ issued in this court," etc.

This judgment the plaintiff in error seeks to reverse in this court.

The following are his assignments of error: That the circuit court erred—1. In overruling the motion made by the plaintiff in error on June 26, 1878, to dismiss the said cause. 2. In sustaining the demurrer to the special plea filed by the plaintiff in error on November 12, 1878. 3. In rendering judgment against the plaintiff in error upon the demurrer. 4. The court had no jurisdiction over the subject-matter of the action.

The circuit court of Cook County and the circuit court of the United States both claimed jurisdiction of the case, and both rendered final judgments therein, the State court in favor of the plaintiff in error, and the United States court in favor of the defendants in error. Most of the points raised upon the record will be solved by a settlement of the question, which court had jurisdiction of the case when said final judgments were rendered. The jurisdiction was, of course, originally in the State court. It is unnecessary to decide whether the State court rightfully or wrongfully denied the first two petitions of the defendants in error for the removal of the cause. The petition for its removal, filed July 6, 1877, contained every averment required by law. It was filed at the proper time, and it was accompanied by a bond with good and sufficient security, conditioned according to the statute.

According to the terms of the act of Congres it was the duty of the State court "to accept said petition and bond and proceed no further in said suit." Sec. 3, Act of March 3, 1875, 18 Stat. 471. Notwithstanding the refusal of the State court to make an order for the removal of the cause, the defendants in error filed in the United States circuit court, within the time prescribed by the statute, a transcript of the record of the State court. This invested the United States court with full and complete jurisdiction of the case, for, in the language of the statute just referred to, "the said copy being entered as aforesaid in said circuit court of the United States, the cause should then proceed in the same manner as if it had been originally commenced in said circuit court."

If the case is a removable one and the statute for the removal of the cause has been complied with, no order of the State court for the removal of the cause is necessary to confer jurisdiction on the United States court, and no refusal of such an order by the State court can prevent the jurisdiction from attaching. Insurance Company v. Dunn, 19 Wall. 214. It is, therefore, clear that when the defendant below filed, on July 27, 1877, in the United States circuit court a transcript of the record of the State court, the former acquired, and the latter lost jurisdiction of the case. The contention of the plaintiff in error seems to be, that an action of replevin, where the sheriff of a State court is the defendant, is not removable, because the sheriff, an officer of the State court, being in possession of the property, the subject-matter of the controversy, the Federal court is without legal authority or power by writs, process or orders to wrest its possession from him.

There is no support either in the act of Congress for the removal of causes, nor in any case adjudged by this court, for this position. The act of Congress makes no exception of causes where the subject-matter of the controversy is in possession of the State court. Under the Constitution and laws of the United States a citizen of the United States, party to a suit in a State court, which falls within the terms of the statute for the removal of causes, has the right to have it removed to and heard by a United States court. The cases of Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450, and Buck v. Colbath, 3

Wall. 334, relied on by the plaintiff in error, are not in point.

Those cases decide that property held by an officer of one court by virtue of process issued in a cause pending therein, can not be taken from his possession by the officer of another court of concurrent jurisdiction, upon process issued in another case pending in the latter court. But here there is but one case. It is brought in the State court. It falls within the terms of the act of Congress for the removal of causes. When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the *res* both go to the Federal court. The fact that the State court, while the case was pending in it, had possession of the subject-matter of the controversy, can not prevent the removal, and when the removal is accomplished, the State court is left without any case, authority or process by which it can retain possession of the *res*. The suit and the subject-matter of the suit are both transferred to the Federal court by the same act of removal, or when a bond for the delivery of the property has been taken, as in this case, the bond, as the representative of the property, is transferred with the suit. There is no interference with the rightful jurisdiction of the State court, and no wresting from its possession of property which it has the right to retain. If the contention of the plaintiff in error is that the State court, having seized property by virtue of a *fieri facias* issued on a judgment rendered by it, the Federal court can not take such property from its possession by writ of replevin, or, in other words, that the replevin suit which was sought to be removed in this case, could not have been originally brought in the Federal court, the answer is that, upon the question of removal, it is entirely immaterial whether or not the suit, as an original action, could have been maintained in the Federal court. In short, no provision of the State law, no peculiarity in the nature of the litigation which would forbid the United States court from entertaining original jurisdiction, could prevent the removal, provided the case fell within the terms of the statute for the removal of causes. Railway Company v. Whitten, 13 Wall. 270; Insurance Company v. Morse, 20 Wall. 445; Gaines v. Fuentes, 92 U. S. 10; Boom Co. v. Patterson, 98 U. S. 403. The United States court having acquired jurisdiction, and the State court lost it by the proper removal of the cause, has the State court been reinvested with jurisdiction by the facts stated in the plea to the jurisdiction filed by the defendant below, namely, that long after the removal of the cause to the United States court, the plaintiffs below filed their replication in the State court, and prosecuted their action therein to a final hearing? In other words, is the plea to the jurisdiction of the United States court, filed by the defendant below on November 12, 1878, a good plea?

It has been expressly held by this court that when a case has been properly removed from a State into a United States court, and the State court still goes on to adjudicate the case, against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation, and the fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the State court to try the case. Insurance Company v. Dunn, 19 Wall. 214; and Removal Cases, 100 U. S. 457; and Railroad Company v. State of Mississippi [12 Cent. L. J. 92], decided at the present term. These cases are directly in point. In the action of replevin the defendant, if he succeeds, recovers in effect the same judgment against the plaintiff as the plaintiff, in case he succeeds, recovers against the defendant. So that the plaintiffs below, in contesting the suit in the State court after its removal, were seeking to protect themselves against a judgment in favor of the defendant for the return of the property in controversy, a judgment which was, in fact, entered against them. Our conclusion, therefore, is that by the proceedings for the removal of this case jurisdiction over it was transferred to the United States circuit court, and the filing by the plaintiffs below of a replication in the State court, after such removal, and the prosecution of the action to a final hearing in that court, did not re-invest the State court with jurisdiction of the cause, nor did it amount to a waiver of any rights resulting to the plaintiffs below from the removal. This conclusion is strengthened by the fact that the plaintiffs below constantly insisted, as the record shows, upon the jurisdiction of the United States court over the case, and even while the case was on final trial in the State court, procured the entry of an order in the United States court to the effect that, upon the filing of the transcript of the record of the State court in the United States court, the latter court acquired exclusive jurisdiction over the case.

After the filing in the United States circuit court, on July 27, 1877, of the record of the proceedings in the State court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgments were not, as some of the State courts have ruled, simply erroneous, but absolutely void. Gordon v. Longest, 13 Pet. 97; Insurance Company v. Dunn, 19 Wall. 214; Virginia v. Rives, 100 U. S. 313.

It only remains to consider the contention of the plaintiff in error, that the court below should not have entered judgment against him after sustaining the demurrer to his plea to the jurisdiction filed November 12, 1878, because there was still remaining his plea to the merits filed July 6, 1877, before the case was removed from the State court. The facts disclosed by the record make it clear that there is no solid ground for this assignment to stand on. The plea of November 12, 1878, was a plea to the jurisdiction. The defend-

ant below was allowed to file it on special leave asked by him, and given by the court. The asking of leave to plead to the jurisdiction was in effect a withdrawal of the plea to the merits; for after a plea in bar the defendant can not plead to the jurisdiction of the court; for by pleading in bar he submits to the jurisdiction. 1 Chitty on Pleadings, 440, 441; Palmer v. Evertson, 2 Con. 417; Co. Lit. 303; Com. Dig. Abatement, C.; Bacon's Abridgt. Abatement, A. The plea in bar being in effect withdrawn by the plea to the jurisdiction, when the demurrer to the latter was sustained, the defendant below was left without plea. If the defendant had so desired, the judgment of the court would have been *respondeat ouster*. But he elected, as the record shows, to stand by his demurrer, and declined to make any further answer. There was nothing then left for the court to do but to pronounce judgment, which was done. There was no error in this. The suggestion that there should have been a trial upon the plea in bar appears to have been an afterthought.

There is no error in the record or the judgment of the circuit court. The judgment must therefore be affirmed.

PARTITION—FINAL JUDGMENT—APPEAL.

GREEN v. FISK.

Supreme Court of the United States, October Term, 1880.

In a suit for partition, a decree that the petitioner is the owner of one-half of the property in question, and that the case be referred "to a master to proceed to a partition according to law, under the direction of the court," is not such a final decree that an appeal will lie.

Appeal from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

Mr. Chief Justice WAITE delivered the opinion of the court:

This was a suit begun by Mrs. Fisk, the appellee, in a State court of Louisiana, to obtain a partition of real property. She alleged that she was the owner of one-half the property; that she was not willing to continue her joint ownership, and that a partition by sale was necessary, as a division could not be made in kind. The prayer of her petition was in accordance with these allegations. Green, the defendant below, being a citizen of California, removed the case to the Circuit Court of the United States for the District of Louisiana. In that court, on the 31st of March, 1879, Mrs. Fisk was decreed to be the owner of one-half the property, and the case was referred to "J. W. Gurley, Esq., master, to proceed to a partition according to law, under the direction of the court." From that decree an appeal was taken by the defendant, which Mrs. Fisk now moves to dismiss, because the decree appealed from is not the final decree in the cause. We think the motion must be granted. In the circuit court the suit was one in equity for partition. Although no formal order was entered assigning it to the equity side of the court, that was clearly its proper place, and it was so treated by the parties and the court. In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made, and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. Mitford Eq. Pl., 4th ed., by Jeremy, 120; 1 Story Eq., § 650; 2 Daniel's Ch. Pr., 4th Amer. ed., 1151. A decree can not be said to be final, until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery commissioners are appointed to make the necessary examination and inquiries, and report a partition. Upon the coming in of the report the court acts again. If the commissioners make a division, the court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division can not be made, and recommend a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended. In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was, in fact, necessary in order to divide the property. The master was in everything to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions, in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for. In foreclosure suits it has been held, that a decree which settles all the rights of the parties, and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the court, and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial. The law has prescribed no fixed rules by which the officers of the court are to be governed in the

performance of the duty assigned to them. The court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds.

The appeal is dismissed.

FORGERY — BILL OF EXCHANGE — INCHOATE INSTRUMENT—INDICTMENT.

REG. v. HARPER.

English High Court; Crown Cases Reserved.

The prisoner was indicted on the first count for forging and uttering an indorsement on a bill of exchange, in the second count on a paper writing in the form of and purporting to be a bill of exchange, and in the third count on a certain paper writing. The facts were these: The prosecutor wrote the body of the bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. *Held*, that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the instrument.

John Harper was convicted of forgery before me at the Durham Assizes, under the following circumstances:

Messrs. Watson & Son, of Kilmarnock, having supplied Harper with some machinery, drew a bill upon him for the price, and forwarded it to him for acceptance, unsigned by the drawers. It had been arranged that Harper should procure the indorsement of a solvent person, and should himself accept the bill. Harper returned it accepted by himself, and purporting to be indorsed by one Hunt. It was proved that Hunt's indorsement had been forged by Harper. On getting the bill back, Watson & Son indorsed it, and paid it into the bank for collection when due. They did not at any time sign it as drawers. The following is a copy of the bill of exchange:

22*l*. 10*s*. 4*d*.—Kilmarnock, Nov. 2, 1880.

One month after date pay to me or order the sum of 22*l*. 10*s*. 4*d*., that being for value received in machinery.

Mr. J. Harper, Contractor and Builder, Rutland street, Pallion, Sunderland. Indorsed, John Hunt, John Watson and Son. Accepted payable at the Union Bank of London, John Harper.

The indictment contained six counts, which charged Harper: 1. With feloniously forging a certain indorsement to and on a bill of exchange. 2. With feloniously forging an indorsement to and on a certain paper writing, which said paper writing is in the form of and purports to be a bill of exchange unsigned by any drawer thereof. 3. Feloniously forging a certain indorsement to and on a certain paper writing. In the 4th, 5th and 6th counts, he was charged with feloniously uttering the documents described in the 1st, 2d and 3d counts. I was of opinion that all the counts were bad, except the first and fourth; but I left the whole matter to the jury. The jury returned a general verdict of guilty, and I sentenced Harper to be imprisoned with hard labor for nine months, but suspended the execution of the sentence till the decision of this case by the court for Crown Cases Reserved. The question for the court is whether, under the circumstances stated, Harper was properly convicted of either of the offenses charged in the first or fourth counts of the indictment, and whether any of the other counts charge a felony.

J. F. STEPHEN.

No counsel appeared to argue on either side.

Lord COLERIDGE, C. J.—The court is of opinion that the conviction on this indictment can not be supported. The prisoner was convicted generally of forging an indorsement on a bill of exchange. All the counts of the indictment were for forging an indorsement on a bill of exchange, or on a paper writing in the form of and purporting to be a bill of exchange, or on a certain paper writing. The document, however, was but an inchoate bill of exchange. A bill of exchange was formally drawn upon and sent to the prisoner for his acceptance, and he was to accept it and to procure the indorsement of a solvent person to it, but there was no drawer's name attached to the bill. The prisoner returned the bill accepted by himself, and with the name of Hunt as the indorsee upon it, but he had forged Hunt's indorsement. Under these circumstances the prisoner can not be convicted upon this indictment, for this document was clearly not a bill of exchange. In McCall v. Taylor, 34 L. J. 365, C. P., it was held that an instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, is neither a bill of exchange nor a promissory note, but only an inchoate instrument. In that case Erle, C. J., said: "The instrument has no date and no drawer's name, but the defendant wrote his acceptance across it, and the question is, has the holder of such an instrument a right to declare on it, either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note. It is in fact only on inchoate instrument, though capable of being completed." Erle, C. J., further cited the case of Stoessiger v. Southeastern Railway Company, 3 El. & B. 549; 23 L. J. 549, Q. B., as in point. In that case the question arose whether a document in the form of a bill of exchange for 11*l*. 10*s*., but which had no drawer's name upon it, was a bill, note or security for the payment of money exceeding 10*l*. within the Carriers' Act, 11 Geo. 4 & 1 Will. 4, ch. 68, sec. 1, and it was held that it was not. In this case we are clearly of opinion that this was a mere inchoate instrument, of no value in the shape in

which it was when the prisoner wrote the indorsement upon it. This is quite clear, as well upon principle as upon the authorities.

GROVE, HAWKINS and LOPES, JJ., concurred.

STEPHEN, J.—Although I agree with the rest of the court that this conviction should be quashed, yet it seems to me that this case has all the effects of forgery, and I think that the prisoner would not have been relieved from them, if he had been indicted for forgery at common law.

Conviction quashed.

IMPUTED NEGLIGENGE—PASSENGER ON STREET CAR—NEGLIGENCE OF DRIVER.

PHILADELPHIA, ETC. R. CO. v. BOYER.

Supreme Court of Pennsylvania, January, 1881.

A passenger on a street-car is killed by a collision with a railroad train, resulting from the negligence of the street-car driver. In an action by his representatives against the railroad company: *Held*, that the contributory negligence of the driver of the horse car would bar a recovery.

Error to the Court of Common Pleas No. 4 of Philadelphia County.

J. E. Gowen, for plaintiffs in error; *Rufus E. Shapley*, for defendants in error.

GORDON, J., delivered the opinion of the court:

Jacob P. Boyer, to recover damages for the loss of whose life this action has been brought by his widow and children, was, on the 6th day of March, 1877, a passenger on the car of the Thirteenth and Fifteenth Street Passenger Railway Company; and, as this car was moving across the track of the Philadelphia, etc. Railroad, it was struck by a passing locomotive. The result was the wreck of the car and the loss of two lives, that of Boyer being one of them.

The success of this action depends upon two assumptions: (1) That the death of Boyer resulted directly from the carelessness of defendant's servants; (2) that the person in charge of the street-car was chargeable with no negligence. It is only on this hypothesis that this suit can be maintained; for the rule is, that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another, the carrier alone must answer for the injury. Lockhart v. Lichtenthaler, 10 Wr. 151. On this theory the case was tried, and the principal point on which it turned was the question whether the driver of the horse-car was or was not guilty of contributory negligence. This, of course, was exclusively for the jury, and it was error for the court to assume as true any fact upon which that body had to pass. Elkins v. McKean, 29 P. F. Sm. 439. When, therefore, in answer to the plaintiff's third point, asking instruction, "that it was the duty of the driver of the passenger car to stop before reaching the railroad, and look and listen for approaching trains; and, if the jury believe from the evidence he failed so to do, the plaintiff can not recover," the court said, "in view of the testimony that the flagman beckoned the driver to come on, this point is declined;" the rule, as before stated, was violated, for the court assumed as true the very fact, of all others, upon which the case turned; since the only possible excuse for the driver for his neglect in not stopping his car was the fact, if fact it was, that the flagman did beckon him to cross the track. His duty to the passengers under his care was of the highest order; whilst that of the flagman, as an employee of the railroad company, was but secondary. He was bound to but ordinary care. The learned judge, however, seems to have inverted this order, for he says: "The highest degree of care, responsibility, vigilance and observation rested upon the flagman, that could possibly be exercised by a man possessing care, vigilance and observation under the same circumstances." Had he applied this language to the driver of the horse-car, it would have been unexceptionable; but to apply it to the flagman was erroneous. It is true that that care, called ordinary care, must vary according to circumstances. What would be ordinary care in handling building sand, would be gross negligence in handling gunpowder; so the care to be exercised in running a locomotive through a crowded city, is something very different from that required in driving the same kind of vehicle through the open country; nevertheless, in both cases the care required is that only which a man of ordinary prudence would exercise under like circumstances. All this the court might and ought to have told the jury, but it had no right to impose upon the company the duty of extraordinary care; that was the obligation resting upon the driver of the street-car, and upon him alone. From what has been said, it follows that the defendant's second point should have been affirmed without qualification, except, perhaps, to explain what ordinary care, under the circumstances, would be.

Furthermore, the learned judge erred in the following instruction: "If you find, however, from the evidence before you in its entirety, that there was no negligence on the part of the Thirteenth and Fifteenth Street Railway Company, then you have no trouble, and should, without a moment's hesitation, reach the conclusion that it is your duty to find against the defendants."

Here again is an assumption in which the court ought not to have indulged. From the evidence, such a conclusion might possibly follow, but it was for the jury to draw it, not the court. Again, the court said: "If the story of the driver is true, then, gentlemen, he had no signal; if the story of Spencer, the colored man, is true, then the flagman, on whom, gentlemen, as great a responsibility as can rest upon any human being rested, was guilty of the grossest negligence." But if the driver had no signal, if the flagman, as the driver himself says, came sauntering out of his box with

his flag rolled up under his arm, giving no heed to the railroad or what was upon it, what, under such circumstances, was the driver's duty? Under his care was the safety of his passengers; upon him rested the superior duty. Surely he ought to have stopped, looked for himself, or asked the flagman so to do, and this the more so, as Spencer was doing all in his power to warn him of the coming danger. The fact is, resting the case wholly upon his own and Spencer's testimony, the driver did not exercise that care which, under the circumstances, was required of him; he had the lives of five men under his charge; he was approaching a place of known danger; had he stopped for one moment, he would have heard the noise of the approaching train; Spencer was directly in front of him, shouting and gesticulating in order to induce him to stop, and, instead of heeding this warning, with an oath, he orders Spencer out of the way and drives on. Now, suppose the flagman did beckon him on—tell him to go on—what was his duty as a prudent man? How could he help knowing that a train was coming? He was not only warned of the fact, but, had he used his eyes, he might have seen it. It is, therefore, well nigh certain that his attempt to cross the tracks at that time, even under the supposition that the flagman signalled him so to do, was the result of criminal carelessness or gross stupidity. One man told him to stop, another to go on; was he not to pause and judge between them by the sure witness of his eyesight? Surely this is a proposition of easy solution, and one, had it been properly submitted, that ought not to have given the jury much trouble. Again, the answer to the defendant's fourth point was wrong, because it assumes the fact, as in the answer to the third point, that the flagman actually did beckon the driver on. The court might have refused this point. It was not necessary for the driver to cross the tracks in advance of his car; this would have been proper, had there been a conductor in charge of this vehicle; but, as there was only a driver, this could not be done. Had he stopped where he could have had a proper view of the road, and looked and listened, he would have discharged his whole duty. This point embodies the City Ordinance regulating the passage of railroad tracks by street cars,—an excellent regulation, and one that should be strictly enforced. But, as we have said in the Railroad Co. v. Ervin, 36 Leg. Int. 244, a municipal ordinance creates no new liability in favor of one injured by the negligence of another; hence, had the driver of the car observed the proper precautions, though they might not have conformed strictly to the directions of the ordinance, that would have been sufficient to have thrown the responsibility of the accident on the defendant, if its servants were negligent. Nevertheless, the court, having undertaken to answer this point, should have done so in a proper manner, and not by an assumption of the prerogative of the jury.

We do not deem it proper now to discuss the exception to the entry of judgment in excess of $5,000, the limit prescribed by the act of 1868. It does not appear that the Philadelphia, etc. R. Co., ever formally accepted the provisions of the act, so as to make them part of its charter; under such circumstances, whether the act applies at all to non-accepting companies, is an important question; and a still more important question is, admitting it thus to apply as a general law, though not part of the company's charter, what effect has the Constitution of 1874 upon the statute by way of repeal? Should the case ever come before us again, which is not likely, it may be presented in a better shape for the discussion of these questions, but for the present we pass them.

The judgment is reversed, and a new *venire* ordered.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

ARMY — POWER OF PRESIDENT TO DISMISS OFFICER—CONCURRENCE OF SENATE.—The true construction of the 5th section of the army appropriation act of July 17, 1866 (14 Stat. 92), is that whereas, under the act of July 17, 1862 (12 Stat. 596), as before its passage, the President alone had the power to dismiss an officer in the military or naval service for any cause which, in his judgment, either rendered the officer unsuitable for, or whose dismissal would promote the public service, he, alone, shall not thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof. Congress did not intend by the act of July 17, 1866, to deny or restrict the power of the President, with the concurrence of the Senate, to displace officers in the army or navy by the appointment of others in their places. Affirmed. Appeal from the Court of Claims. Opinion by Mr. Justice HARLAN.—*Blake v. United States.*

REHEARING — EXCEPTIONS TO REPORT OF COMMISSIONER — PRACTICE. — The rehearing [see 12 Cent. L. J. 137] is asked on two grounds: 1, because on the evidence the decree below should have been reversed; and, 2, because the exceptions to the commissioner's report were not considered. As to the question of fact, two courts have already decided against the Sabine and the insurers of her cargo. The appellant in such case has all presumptions against him, and the burden is cast on him of proving affirmatively some mistake made by the judge below in the law or in the evidence. Newell v. Norton and ship, 3 Wall. 267; The Hypodame, 6 Wall. 223; The S. B. Wheeler, 20 Wall. 386; The Lady Pike, 21 Wall. 9; The Baltimore, 8 Wall. 382. This was

done to the satisfaction of the court. 2. As to the exceptions to the report of the commissioner. The report of the commissioner was presented June 4, 1875, after the law of 1875 went into effect. The exceptions were filed the next day. All the exceptions that were argued in the court below or here relate only to questions of fact, depending on the weight of the evidence. The court omitted to find the facts, and the case comes here on the evidence. This, since the act of 1875, we are not bound to consider. If the appellants had desired to press their exceptions, they should have got a finding of the facts, so as to present questions of law alone. The case on its merits came up under the old law, and we were compelled to consider the testimony; but on the master's report the law of 1875 was applicable, and our review is confined to questions of law. The petition for rehearing is denied. Appeal from the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Chief Justice WAITE.—*The Sabine v. The Richmond.*

BANKRUPTCY — FRAUDULENT PREFERENCE—KNOWLEDGE ON THE PART OF THE GRANTEE OF THE FRAUD.—This was a bill in equity to set aside two mortgages as void under the bankrupt law. The bankrupt had been the administrator of the deceased husband and father of the defendants, and after administering the estate, he retained in his hands a balance of $24,000 which he never paid over to the widow as he should have done. In the summer of 1873 the widow, Mrs. Barbour, was called upon by the probate court to make a settlement showing the condition of her accounts as guardian of her minor children, and to file a new bond. She filed the bond, but did not make the settlement. On September 20 of the same year, she received another notice requesting her to file a statement of her account on the next day. She testified that she had handed both these notices to Mr. Colby (the bankrupt), and that she relied on him entirely in the matter. On the first day of October Colby made two mortgages on distinct parcels of real estate, for the purpose of securing his indebtedness to Melissa A. Barbour in her right as widow, and as guardian of the minor children of her husband, in the sum of $22,722.20, then in his hands as administrator of the estate of Justus Barbour. Colby was adjudicated a bankrupt on a petition filed November 3, 1873. The testimony on which the decree was rendered is very voluminous, and need not be critically examined here. We think three propositions of fact are so clearly established, that there can be little doubt about them. They are: 1. That when Colby made the mortgages to Mrs. Barbour, he was insolvent, and knew he was in that condition. 2. That he intended by those mortgages to give Mrs. Barbour a preference over his other creditors, by securing the debt due her and her children from him, as administrator of Barbour's estate. 3. That Mrs. Barbour did not know, nor have reasonable cause to believe, that Colby was insolvent when the mortgages were made and filed for record. At the time these conveyances were made, section 35 o the Bankrupt Act of 1867 was in force: *Held*, that the obvious meaning of that provision is to require the concurrence of the creditor who gets security for his debt, in the purpose of defeating the bankrupt act. Grant v. National Bank, 97 U. S. 80. Reversed. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Opinion by Mr. Justice MILLER. — *Barbour v. Priest.*

SUPREME COURT OF ILLINOIS.

June, 1881.

NEGLIGENCE— INSTRUCTION — VERDICT—REMITTITUR.—1. In a suit to recover for an injury claimed to have resulted from the negligence of the plaintiff, an instruction for the plaintiff, that if, while the plaintiff was crossing the track, the defendant ran its train upon the track, recklessly and negligently, without ringing a bell or blowing a whistle, or giving a warning of any kind, and ran a car upon and against the plaintiff's wagon, thereby smashing the same and throwing plaintiff from his seat on the wagon, thereby causing to the plaintiff serious injury, then plaintiff is entitled to recover, where the evidence was conflicting, was *held* not erroneous, as omitting the vital condition that the reckless running of the train, and failing to give the usual signals, must have been the cause of the accident. The word "thereby" in the instruction was intended to refer to all that preceded it, both as to the act of propulsion and the act of striking. 2. There is no error in denying a motion for a new trial in an action *ex delicto*, where the plaintiff, by entering a remittitur, reduces the damages awarded by the jury to an amount the court considers reasonable. 3. Although the newly-discovered evidence shown for a new trial may have an important bearing on a second trial, yet a new trial will be denied where the requisite diligence has not been exercised to discover such evidence. Affirmed. Opinion by SHELDON, J.—*Union Rolling Mill Co. v. Gillen.*

PARTNERSHIP—SALE OF ASSETS—SURVIVING PARTNER.—1. A surviving partner can not become a purchaser of the property of the firm at his own sale; he can not thus occupy the position of both vendor and purchaser; nor can he become the purchaser of such property from a co-trustee. 2. But this rule has no application to the case of a purchase by a surviving partner of the share in the partnership property belonging to the estate of the deceased partner, from the personal representatives of the latter. In such a transaction, the surviving partner is not to be considered as dealing with trust property in that sense which would bring the sale within the legal prohibition. 3. The executor of a deceased partner sold to the surviving partner, "all the interest in the flour mill and property of the firm, which the testator

had at the time of his death, or which the executor then had, the sale to include the debts due said firm by account or otherwise." The guardian of one of the legatees under the will of the testator filed his bill in chancery against the executor and the surviving partner, for an account of certain profits which it was alleged had been earned by the firm property while in the hands of the surviving partner, subsequent to the death of the testator. But it was *held*, that whatever profits had been thus earned, they passed by the sale from the executor to the surviving partner, so there was no ground for an accounting. 4. Where the debts of a partnership have been paid, a surviving partner and the representatives of a deceased partner may properly make a specific division of the remaining assets between them, if they choose to settle the business in that way. So where an executor of a deceased partner, upon making sale of the interest of the testator in the partnership property to the surviving partner, received in part payment a *chose in action*, it was held no ground of complaint on the part of a legatee under the will. 5. Where an executor sold real and personal property at private sale, under power given in the will, upon bill filed by a legatee, the propriety of the sale coming in question, it was *held*, that the recital in the deed for the land of the amount of the consideration paid, was not conclusive as to the value of the land. It might be *prima facie* evidence, but that is all. 6. Mere inadequacy of price, in the absence of fraud, is not enough to impeach an executor's sale of property of the estate. Affirmed. Opinion by CRAIG, J.—*Kimball v. Lincoln.*

JURISDICTION OF SUPREME COURT — FREEHOLD—QUIETING TITLE.—On bill to have an agreement for the exchange of lands canceled, and to recover $1,000 liquidated damages for a neglect or refusal to perform the contract, when the defendant filed a cross-bill asking the same relief against the complainant, but afterwards by amendment prayed either for the specific performance of the agreement, or a personal decree for the liquidated damages, both bills treating the contract as an alternative one, giving the parties each a right to perform by conveying, or by paying the agreed damages, and the circuit court dismissed the original bill and rendered a decree on the cross-bill, that the complainant convey the lands he agreed to within a certain time, and that in default of such conveyance he pay to the defendant $1,000, the liquidated damages: *Held*, on appeal by the complainant in the original bill, that no freehold was involved, and, therefore, the appeal did not lie to the Supreme Court. 2. A decree which gives a defendant an election to convey land to the complainant in pursuance of his agreement, or to pay a certain sum of money in lieu of such conveyance, in no sense affects the lands of the party against whom it is rendered, and no appeal lies directly to the Supreme Court. 3. In a bill to remove a cloud from the title to real estate, a freehold may or may not be involved, depending upon that which is claimed to create the cloud. When the litigation concerns an executory or conditional contract which is alleged to create a cloud, a freehold is not necessarily involved. If the cloud is a mere incumbrance, a freehold is not involved. 4. Unless a party shows title to land in himself, he can not complain that there is a cloud upon it. He must have a title to the land to give him a standing in court before he can contest a cloud upon the title, whether it is created by an incumbrance or an adverse title. In such case the real contest is as to that which creates the cloud and not the title of the party complaining, unless it is put in issue by the pleadings. Appeal dismissed. Opinion by SCOTT, J.—*Hutchinson v. Howe.*

SUPREME COURT OF INDIANA.

May, 1881.

FRAUDULENT CONVEYANCE—ACTION.—Appellee sued as a judgment creditor of defendant, Samuel Love, to set aside, as fraudulent, a certain conveyance of real estate alleged to have been executed by him and his wife to appellant, Lewis Love. After the jury had returned a general verdict for appellee, against all of the defendants, the court granted the said Samuel Love a new trial. As to him, the cause was then submitted to the court, on a special finding of facts and conclusions of law made. The court found, among other things, that the conveyance was made by Samuel Love in good faith, and it was a *bona fide* transaction on his part; and further, that at the date of the conveyance Samuel Love was the owner of other real estate and which he still owned, of a value largely in excess over all incumbrances of the amount of appellee's judgment. As a conclusion of law the court found that no judgment could be rendered against Samuel Love, etc. The court then overruled appellant's motion in arrest of judgment against him, and for a judgment in his favor. The court erred in each of these rulings, and in rendering judgment against the appellant. From the court's special finding of facts, and its conclusions of law thereon, it is clear that appellee had no cause of action against Samuel Love, and a valid cause of action against Samuel Love, in appellee's favor, was the only foundation for any claim or cause of action in her favor against appellant, Lewis Love. 59 Ind. 346; 60 Ind. 70. Reversed. Opinion by HOWK, J.—*Love v. Geyer.*

MUNICIPAL CORPORATION—NOTICE TO.—Action by appellee against appellant to recover damages for an alleged injury to appellee in driving over a bridge across a certain ditch, which it was alleged the city had negligently suffered to be and remain out of repair. The court gave the following instruction to the jury: "Notice to the councilmen or street commissioner is notice to

the city." It is insisted that this instruction is wrong, insomuch as it declares that notice to councilmen is notice to the city. The term councilmen may well be said to have meant the official body of councilmen. But the instruction is correct, using the term referring to the individuals; or a notice to a councilman is notice to the city. Under ordinary circumstances, the fact of a bridge having been out of repair and in a dangerous condition for some time, would warrant an inference of knowledge on the part of the officers of the city, or some of them, having duties in reference thereto, of the fact. It was competent for the plaintiff, a physician, to prove what his professional earnings had been per year for five or six years, and how much his business had fallen off since the injury. Elliott, J., dissents, and holds that notice to an individual councilman is not notice to the municipal corporation, unless the councilman was at the time engaged in the business of the municipality. Affirmed. Opinion by WOODS, J.—*Logansport v. Justice.*

RESTRAINING ORDER—PARTNERSHIP.— Under the statute a restraining order may be granted until a hearing can be had, as well as until notice can be given. Upon a hearing of the case after notice or appearance, the temporary injunction may be granted, or the restraining order dissolved or perpetuated in the shape of a temporary injunction. 16 Ind. 432. A court has the power to grant a restraining order without a hearing, when there is an appearance of the defendants and a hearing demanded. It is well settled that one partner, or any number of partners, have no right to give a preference to his or their debts over those of general partnership creditors; and a partner has no right to take the assets of the firm to repay capital invested, in preference to the payment of general partnership creditors. The partnership assets belong to the partnership creditors, and the partners themselves are only entitled to what is left after the payment of the partnership debts, and are individually liable for any deficiency therefor. 16 Ind. 365; 48 Ind. 247; 7B. Monroe, 608; 41 Ind. 504. Under the facts set forth in the complaint in this case, the court was justified in appointing a receiver. Affirmed. Opinion by FRANKLIN, COMMISSIONER.—*Morey v. Ball.*

PERSONAL INJURY TO WIFE—ACTION BY HUSBAND AND WIFE.—In an action by a husband and wife to recover for injuries sustained by the wife, the wife is the possessor of the meritorious cause of action, and the recovery is sought for her benefit, and she is a competent witness. In such an action, an exception to evidence as follows: "Defendant excepts to all the evidence in reference to damage to clothing, medical attendance and hired help," is insufficient; a party objecting to evidence must state the grounds of his objections. The unlawful and wrongful restraint of personal liberty is an actionable wrong. Exemplary damages are recoverable in actions brought by the person injured by the tortious restraint or imprisonment. Affirmed. Opinion by ELLIOTT, J.—*Farman v. Farman.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

25. A and B live together as husband and wife for three years, from which there is an illegitimate issue, but acknowledged by both. At the end of that time A abandoned B without providing for her and the child for one year. According to the laws of Mississippi, can A claim and take away the child from the mother, or has he abandoned his right to the child?

New Orleans, La. S. C. B.

26. L, a widower and not the head of a family, but with children living, homesteaded a piece of land in Kansas, under the United States homestead law. After performing all the conditions requisite to entitle him to a patent, but prior to his procuring it, he married and died. The widow has no children and is not the head of a family; she made the final proof and received the patent as the widow of the deceased. Who is the owner of this land under the United States homestead law, and to whom did it descend at the death of L? SUBSCRIBER.

Newton, Kan.

QUERIES ANSWERED.

Query 19. [13 Cent. L. J. 137.] Smith was brought from Illinois to Nebraska on a requisition of the Governor to answer to the charge of grand larceny. Having an examination, he was discharged. Can he be again arrested and held to answer to a misdemeanor before having time to return to Illinois? The Governor of Nebraska refused to issue a requisition for his arrest to answer to the misdemeanor, and the charge of larceny, which is a felony under the laws of Nebraska, was trumped up for the purpose of bringing him into the State.

Central City, Neb. E.

Answer. I refer E to Ham v. State, 4 Tex. Ct. App. Rep. 645, where the distinction is clearly made between international and inter-state questions in extradition and requisition cases. R. E. S.

Camden, Ark.

Query 18. [12 Cent. L. J. 119.] If A owns the fractional sections around a lake, and by drainage uncovers a strip one hundred feet in width around the lake, and afterwards sells the fractional sections by the description of his original purchase, and subsequently the lake becomes entirely dry — To whom does the lake bed belong—to A, or to the purchaser from him of the fractional sections?

Indianapolis, Ind. E. K. L.

Answer. A owning the land fronting on the lake would become the owner of all the lake bed uncovered by the subsidence of the water. Jones v. Johnson, 18 How. 156; Banks v. Ogden, 2 Wall. 57; St. Clair v.

Lovingston, 23 Wall. 46; Murray v. Lennon, 1 Hawks, 56; Municipality v. Cotton Press, 18 La. An. 122; Belding v. State, 25 Ark. 120. The surveyor's field notes, of course, bounded the fractional sections on the lake shore, and whether the deed to A contained a description of the land by lots or by the field notes, his conveyance to purchasers by like description would convey to lake shore at the time of the conveyance, inasmuch as distances in description of lands yield to natural boundaries. Bouvier Law Dic., under Boundary, and cases cited; 2 Wash. Real Prop., 630-8; 1 Greenl. on Ev., 145, 301. The purchasers of A, owning to the shore, would be entitled to all future accretions. Authorities *supra*. O. J. PARKER.

Le Sueur, Minn.]

RECENT LEGAL LITERATURE.

WHARTON ON CONFLICT OF LAWS: A Treatise on the Conflict of Laws or Private International Law. By Francis Wharton, LL.D. Second Edition. Philadelphia, 1881: Kay and Brother.

The subject of Private International Law is one of great and growing importance to the bar of this country. The divided nature of our sovereignty, the restless habits of our people, and the large and constantly increasing foreign element in our population, are some of the causes which tend to increase the volume of litigation of controversies of that nature, in our courts. Questions of extreme difficulty on the subject of domicile and extradition are constantly arising, in dealing with which, those practitioners, who have not made a careful study of the subject, find themselves gravely embarrassed. To all such this work of Dr. Wharton's, and more especially, this second edition, enriched with the addition of all the latest materials from both home and foreign sources, will be found to be of the greatest utility. We can not, however, refrain from expressing the opinion that for the purposes of the practitioner, the book is not all that could be wished. Dr. Wharton is nothing, if not philosophical; and while his treatment of legal questions is eminently scientific, it is doubtful whether practical men, investigating for practical purposes, would not have been better satisfied with less dissertation of the principles upon which the law should be founded and a more pointed statement of the result of the authorities. Life is short, and law books, alas, are many, very many. Books of condensed arrangement are growing in favor with the bar, and while Mr. Wharton's fills an unsupplied void in the literature of the profession, and will be of unquestioned utility to the student whose time and purpose permit him to make an exhaustive study of the entire subject in all its details, we think that there is yet room for a work upon a similar topic, which shall be specially adapted to the needs of the active practitioner.

NOTES.

The following is authentic. It is a "stray appraisement," and was picked up by one of our subscribers during his summer rambles.

State of Missouri, } ss.
County of Warren. }

The undersigned, Henry —— and Fred ——, appraisers appointed and sworn fully, fairly and impartially before Henry ——, a justice of the peace, within and for the County of W and State aforesaid, to appraise a certain steer taken up as a stray by —— ——, of —— —— Township, in the County of W, certify that we have viewed the said stray, and find the same to be of a black collar with white spots on both sides, and under the belle white, also the end of the tail is white, and about three years of age. No other brands or marks visible, and do appraise the said stray at the sum, etc.

Appraisers.

——A young lawyer, just "establishing" out West, writes: "I am getting into practice. The voice of forensic eloquence—in logical argument, pathetic appeal, or fiery invective—is heard in the courts of justice [that's mine]! The innocent and oppressed seek the protection and defense of the strong arm of the law [them's my clients]! There are, however, unworthy members of the profession who look upon the noble science of jurisprudence as a system of sophistry and chicanery; who use the laws, intended as a shield for the innocent and a staff for the weak, to uphold injustice and protect the guilty [that's opposite counsel]! But not always, even in this world, does crime go unwhipped of justice; not always do the wicked [that's his clients] escape the fruit of their iniquity [that's judgment, with costs and damages]; nor the virtuous [that's me again] fail to receive their just reward [and that's FEES]! !"

——"I object, your honor, to this witness' testimony." "Upon what ground?" said the judge. "My point is, your honor, that evidence from a person occupying the professional position of the witness is unreliable." "What did I understand the witness to say his occupation was?" asked the judge. "Washington correspondent of a New York daily paper," was the reply. "Ah!" said the judge, "the point is well taken; the court sustains your objection, Mr. Cokestone."—*Boston Commercial Bulletin.*

——"What is your occupation?" asked the magistrate, as he beamed at the burglar through his spectacles. "Wot ham I, yer washup?" replied the burglar in his most silvery tones, "why, a house cleaner, in course!"